

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9778

File: 47-370610; Reg: 18086992

HYATT CORPORATION,
dba Hyatt Regency San Francisco
5 Embarcadero Ctr
San Francisco, CA 94111,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: August 16, 2019
Sacramento, CA

ISSUED AUGUST 26, 2019

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltsman & Jamieson,
as counsel for Hyatt Corporation,

Respondent: Matthew Gaughan, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Hyatt Corporation, doing business as Hyatt Regency of San Francisco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 5 days, with all 5 days conditionally stayed, because its employee served an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658(a).

¹ The decision of the Department, dated December 4, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's type 47 on-sale general bona-fide eating place license was issued on April 28, 2003. There is no history of discipline against the license.

On May 29, 2018, the Department filed an accusation charging that appellant's employee, Zefralyn Paguinto Osborn (the employee), sold an alcoholic beverage to 19-year-old Alejandro Crus Arteaga Hernandez (the decoy) on March 8, 2018. Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on September 19, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy, Department agent Vikas Kurian, and appellant's reservations manager, Bradley Nelson.

Testimony established that on March 8, 2018, the decoy and Valerie Garcia Aldaco (Aldaco), a second decoy involved in the operation, entered the licensed premises. Both the decoy and Aldaco were 19 years old at the time. When the decoy entered the premises, he was approximately 5'7" tall and weighed approximately 165 pounds. He wore a black hooded zippered sweater over a black t-shirt with blue jeans and Adidas tennis shoes. His hair was black and approximately one to two inches long on top, and very short on the sides. He had no beard, mustache, goatee, or other facial hair.

The decoy and Aldaco were accompanied by Agent Kurian and two additional Department agents. Together, they entered the licensed premises and went upstairs to the bar area. The decoy and Aldaco separated from the agents and sat together on a couch away from the bar counter. The employee, respondent's waitress, approached the decoy and Aldaco and asked what they wanted. Aldaco asked for a coke, which was not available, so she asked for a water instead. The decoy ordered a Bud Light

beer. When the employee asked the decoy for his identification, he presented his valid California Driver's License (CDL), which was vertically formatted indicating the decoy was under 21 years of age. Further, the decoy's CDL had a red stripe with the words "AGE 21 IN 2019." Finally, the decoy's CDL contained his correct date of birth showing him to be 19 years old.

The employee examined the decoy's CDL for approximately three seconds before she returned it. The employee left the area and returned a few minutes later with a bottle of Bud Light beer, which she served to the decoy. Agent Kurian, who witnessed the employee's interaction with the decoy, made contact with the employee, identified himself, and informed her that she served an alcoholic beverage to a minor. The decoy then positively identified the employee as the person who served him the beer. The employee stated that she had misread the decoy's CDL and thought it indicated he was born in 1997. Agent Kurian then issued the employee a citation.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant filed a timely appeal contending that the Department failed to proceed in a manner required by law by failing to disclose the participation of a second decoy in the sting operation and failing to produce the second decoy at the administrative hearing, as required by Business and Professions Code section 25666.

DISCUSSION

Appellant contends the Department erred by failing to both disclose and produce the second decoy, Aldaco. (AOB at pp. 4-9.) Specifically, appellant contends that Aldaco's presence "could have increased the apparent age of the purchasing decoy" under the actual circumstances presented to the seller. (*Id.* at p. 7.)

In *CEC Entertainment*, a case very similar to this one, this Board discussed the relevance of a second decoy and when a second decoy may be required at the hearing:

Appellant contends that the administrative law judge (ALJ) should have compelled the presence of Carlos Perez, a second decoy who accompanied the decoy to whom the beer was sold, so that he (the ALJ) could conduct a full and fair analysis of the apparent age of Duran. Appellant cites *Hurtado* (2000) AB-7245, a decision of the Appeals Board which ruled that consideration of the effect of another person who accompanied a decoy was "essential for disposition."

In *Hurtado*, a 27-year-old plain-clothes policeman sat at a small table with a minor decoy. Each ordered and were served a beer. The Appeals Board concluded that the "active participation" of the police could have misled the seller as to how the decoy appeared. Thus, the decoy operation was unfair and violated Rule 141.

This case is nothing like *Hurtado, supra*. There is no evidence in this case that the second decoy did anything, by way of word or gesture, that might have distracted the clerk or caused the kind of confusion that was the concern of the Board in *Hurtado, supra*, or *Southland Corporation/R.A.N., Inc.* (1998) [AB-6967], another Board decision cited by appellant.

In *7-Eleven, Inc./Jamizeh* (2002) AB-7790, the Board explained that "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law."

Thus, the mere fact that a second decoy accompanied the decoy who made the purchase is not, in and of itself, enough to persuade us that the decoy operation was unfair. The clerk did not testify, so any claim that the clerk was actually misled is wholly speculative.

(*CEC Entertainment, Inc.* (2004) AB-8189, at pp. 2-3.)

First, this appeal is nearly identical to *CEC Entertainment, Inc., supra*. Here, Appellant contends, without any evidence, that Aldaco's presence necessarily influenced the employee's perception of the decoy's age, and therefore must be relevant. However, there is nothing in the record or in appellant's brief to suggest that Aldaco participated in any way in the transaction, or that Adalco's appearance had any

impact on the employee's decision to serve the decoy. To this point, the ALJ made the following findings regarding Aldaco:

14. Aldaco also operated as a decoy with the team of ABC Agents and Decoy Hernandez. At some other licensed premises they checked that day, Aldaco was the person who attempted to obtain an alcoholic beverage. However, at Respondent's premises, she sat next to Decoy Hernandez posing as his companion and did not order any alcoholic beverage from Osborn and only ordered water. Aldaco had no other interaction with Osborn. Osborn never told Agent Kurian or Respondent the presence of Aldaco next to Decoy Hernandez had any effect upon her decision to serve Decoy Hernandez his beer. Osborn only told them she misread the birth year on Decoy's [sic] Hernandez's driver license.

(Findings of Fact, ¶ 14.) These findings accurately reflect the evidence in the record.

The Board sees no cause to second-guess the ALJ's conclusions on this issue.

Second, appellant is hard-pressed to imply that the Department concealed Aldaco's presence or that her appearance somehow impacted the employee's decision to serve beer to the decoy. Appellant's employee, who was not terminated, was aware that the decoy was with a second individual on March 8, 2018. Yet, the employee did not testify. Appellant cannot expect the ALJ, the Department, or the Board to know what went through the employee's mind in the course of the transaction, or why she made the sale — in spite of looking directly at the decoy's CDL, which showed him to be 19 years of age.

Again, absent some evidence to establish that the presence of a second decoy was the *actual reason* the employee served alcohol to a minor decoy, appellant's arguments must fail.²

² As stated above, this is further unlikely here, as there was evidence in the record that the employee told agents that she misread the decoy's CDL. (Findings of Fact, ¶ 10.) Notably, the employee did not say anything about either the decoy or Aldaco's appearance.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.*

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

HYATT CORPORATION
HYATT REGENCY SAN FRANCISCO
5 EMBARCADERO CTR
SAN FRANCISCO, CA 94111-4800

ON-SALE GENERAL EATING PLACE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

CONCORD DISTRICT OFFICE

File: 47-370610

Reg: 18086982

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on November 28, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

Sacramento, California

Dated: December 4, 2018

RECEIVED

DEC 05 2018

**Alcoholic Beverage Control
Office of Legal Services**



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Hyatt Corporation
Dbas: Hyatt Regency San Francisco
5 Embarcadero Center
San Francisco, CA 94111

Respondent,

Regarding Its Type 47 On-Sale General Bona-Fide
Eating Place License Under the State Constitution and
the Alcoholic Beverage Control Act.

} File: 47-370610
}
} Reg.: 18086982
}
} License Type: 47
}
} Word Count Est: 18,318
}
} Rptr: Christie Curry, CSR-13982
} Emerick and Finch Reporters
}
} **PROPOSED DECISION**
}

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in San Francisco, California, on September 19, 2018.

Matthew Gaughan, Attorney, Office of Legal Services, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (Hereafter Department)

Donna Hooper, Esq., of Solomon, Saltsman, and Jamieson, represented licensee Hyatt Corporation, doing business at Hyatt Regency San Francisco. (Hereafter Respondent)

As set forth in the Department's accusation, it seeks to discipline Respondent's license on the grounds that, on or about March 8, 2018, Respondent, through its agent or employee, Zefralyn Paguinto Osborn, at said premises, sold, furnished, or gave away, or caused to be sold, furnished, or given away, an alcoholic beverage to Alejandro Crus Arteaga Hernandez., a person under the age of 21, in violation of California Business and Professions Code section 25658(a).¹ (Exhibit 1: Pre-hearing pleadings)²

¹ All further statutory references are to the California Business and Professions Code unless otherwise noted.

² The Department's motion to correct the spelling of the server's name from Osburn to Osborn was made and granted at the hearing.

After oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing, the matter was argued by the parties and submitted for decision on September 19, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on May 29, 2018. On June 18, 2018, the Department received Respondent's Special Notice of Defense requesting a hearing on the accusation. The matter was set for a hearing.
2. On April 28, 2003, the Department issued Respondent a type-47 on-sale general bona-fide eating place license for its premises as captioned above.³ (Hereafter the Licensed Premises)
3. The Department did not allege Respondent suffered any prior disciplinary history since licensed.
4. On March 8, 2018, Alejandro Crus Arteaga Hernandez (Hereafter Decoy Hernandez) and Valerie Garcia Aldaco (Hereafter Aldaco) assisted the Department of Alcoholic Beverage Control in conducting a decoy operation at Respondent's premises. A decoy operation consisted of the Department sending in an underage person to attempt to purchase an alcoholic beverage from businesses licensed to retail in alcoholic beverages. At Respondent's premises, Decoy Hernandez was the decoy and Aldaco posed as his companion. Both Decoy Hernandez and Aldaco operated under the supervision of Alcoholic Beverage Control Agents Kurian, Ott, and Louie.
5. Decoy Hernandez was born on May 18, 1998 and was 19 years old when he went into Respondent's premises on March 8, 2018. Aldaco was also 19 years old when she accompanied Decoy Hernandez into Respondent's premises.
6. Prior to going to Respondent's premises, Decoy Hernandez was instructed by ABC Agents that when he attempted to obtain an alcoholic beverage at those premises he visited, if the salesclerk or server asks to see his identification he should present it for their inspection. If the salesclerk or server asked his age, he was to disclose his true age. If he obtained an alcoholic beverage, he was to await contact by ABC Agents.
7. When Decoy Hernandez entered the Respondent's premises, he was approximately 5'7" tall and weighed approximately 165 pounds. He wore a black hooded zippered sweater over a black t-shirt. He wore blue jeans and Adidas tennis shoes having a grey and white zebra like pattern. His hair was black and no longer than approximately one to two inches on top

³ A type-47 license permits the holder to retail in beer, wine, and distilled spirits for consumption on the licensed premises which must also operate as a bona-fide eating place as defined in section 23038.

and cut very short on the sides. He had no beard, moustache, goatee or like facial hair. (Exhibit 2: Photo of decoy) His overall appearance was appropriate for his age and he did not appear any older than his actual age, 19.

8. On March 8, 2018, Decoy Hernandez, Aldaco, and ABC Agents Ott, Louie, and Kurian entered the licensed premises, a hotel facility. They went upstairs to the bar area. Decoy Hernandez and Aldaco sat together on a couch away from the bar counter while the ABC Agents separated from the pair. Respondent's waitress, Zefralyn Paguinto Osborn, (Hereafter Osborn) approached and asked Decoy Hernandez and Aldaco what they wanted. (Exhibit 3: Photo of server Osborn) Aldaco asked for a coke, which was not available there, so asked for water. Decoy Hernandez ordered a Bud Light beer. Osborn asked Decoy Hernandez for his identification. He presented his valid vertically formatted California Driver License to Osborn. She examined it for about three seconds before she returned it to Decoy Hernandez. Osborn left the area and returned a few minutes thereafter and served Decoy Hernandez a single bottle of Bud Light beer. (Exhibit 4: Photo of Decoy-Hernandez's beer) Osborn asked if he wanted anything else. Decoy Hernandez indicated he did not, and Osborn left the area.

9. After Agent Kurian witnessed Osborn's interaction with Decoy Hernandez from approximately 10 feet away, he made contact with Osborn, identified himself as an Alcoholic Beverage Control Agent, and informed her she served an alcoholic beverage to a minor.

10. Agent Kurian led Osborn to Decoy Hernandez who had then moved from his table to a place closer to the counter. There, Agent Kurian asked Decoy Hernandez if Osborn was the person who had served him his beer. Decoy Hernandez identified Osborn as that person who served him his beer. Decoy Hernandez was about 3-4 feet from Osborn when he identified her to Agent Kurian. Both Decoy Hernandez and Osborn were generally facing one another at that time. Sometime after the face-to-face identification occurred, Osborn conveyed to Agent Kurian that she had misread the decoy's identification and thought it indicated he was born in 1997. Also after the face-to-face identification was completed, Agent Kurian issued Osborn a citation for serving an alcoholic beverage to Decoy Hernandez.

11. Decoy Hernandez's California Driver License was vertically formatted, typically issued to those who are under 21 years old. However, they may be valid even after the holder turns 21 years old. In this case, his license did not expire until 2021, when Decoy Hernandez would be nearly 23 years old. (Exhibit 5: copy of decoy's driver license)⁴ However, his license also states in white printing within a red stripe the words "AGE 21 IN

⁴ During its post-hearing review of Exhibit 5, the ALJ inadvertently wrote a series of numbers in red ink on the exhibit. Those are not part of the exhibit and should be disregarded.

2019". Also, his license does set out his true birthdate of May 18, 1998, making him 19 years old on this visit to Respondent's premises

12. As of March 8, 2018, Decoy Hernandez had been a Newark Police Department Explorer for about two years. He attended weekly explorer meetings. He also went on ride-alongs and assisted at public events. He also helped at parades and festivals with parking and unformed patrol. He felt his explorer experience helped him mature.

13. As of March 8, 2018, Decoy Hernandez had participated in one prior decoy operation and one prior "shoulder-tap" operation.⁵ On March 8, 2018, Decoy Hernandez attempted to obtain an alcoholic beverage at 17 licensed premises. He obtained an alcoholic beverage at seven licensed premises. One of the seven was Respondent's premises.

14. Aldaco also operated as a decoy with the team of ABC Agents and Decoy Hernandez. At some other licensed premises they checked that day, Aldaco was the person who attempted to obtain an alcoholic beverage. However, at Respondent's premises, she sat next to Decoy Hernandez posing as his companion and did not order any alcoholic beverage from Osborn and only ordered water. Aldaco had no other interaction with Osborn. Osborn never told Agent Kurian or Respondent the presence of Aldaco next to Decoy Hernandez had any effect upon her decision to serve Decoy Hernandez his beer. Osborn only told them she misread the birth year on Decoy's Hernandez's driver license.

15. Respondent generally trained its food and beverage employees for approximately two weeks before they serve customers on their own. Training included working with more senior employees for at least ten work shifts, of not less than six hours per shift. Respondent has many long term employees that work in its food and beverage service. Respondent has a policy that servers need to check the identification of those patrons purchasing alcoholic beverages who do not look at least 30 years old. Respondent conducted annual classes to remind its service staff regarding the appropriate and proper practices for selling and serving alcoholic beverages.

16. After the decoy operation, Osborn conveyed to Respondent's management she just had a total lapse in dealing with the decoy and she misread the birthdate on his identification. Osborn was counseled, retrained, and given a written warning. She was retained on Respondent's staff due to her otherwise overall positive performance as an employee.

⁵ Shoulder-tap operations involve underage persons who, operating under police direction and supervision, ask randomly selected persons to purchase alcoholic beverages from ABC licensees on behalf of the underage person. Decoy operations consist of underage persons who, under police supervision and direction, attempt to directly purchase or be served alcoholic beverages from ABC licensees. It was assumed that an "operation" consisted of visiting several licensees, as in this case.

17. After Respondent learned of the violation, it made concerted and strenuous efforts to thoroughly retrain and remind its entire server staff on a regular basis of the need for responsible service of alcoholic beverages and some techniques, methods, and approaches that can be used to accomplish that goal. Respondent's staff was also regularly reminded of the legal consequences of improper service of alcoholic beverages to minors and obviously intoxicated patrons upon not only upon the server involved but consequences to Respondent's business and its ABC license.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Business and Professions Code Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Business and Professions Code Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Business and Professions Code Section 25658(f) permits law enforcement officials to use persons under 21 years old to apprehend licensees, employees or agents or other persons who sell or furnish alcoholic beverages to minors. The Department was directed to and did adopt and publish a rule regarding the use of underage decoys.
5. Under California Code of Regulations, title 4, division 1, article 22, section 141, commonly referred to as "rule 141",

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

- (1) At the time of the operation, the decoy shall be less than 20 years of age;

(2) The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense;

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

DETERMINATION OF ISSUES

1. Cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) because on March 8, 2018, Respondent's employee, Zefralyn Paguinto Osborn, inside the Licensed Premises, served an alcoholic beverage to Alejandro Crus Arteaga Hernandez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4 through 8)

2. The evidence established 19 year old Decoy Hernandez, accompanied by 19 year old Valerie Aldaco, sat in the bar-lounge area of Respondent's licensed premises. Waitress Osborn solicited their order. Decoy Hernandez ordered a Bud Light beer and Valerie Aldaco ordered a glass of water. Osborn asked for and inspected Decoy Hernandez valid California Driver License that clearly disclosed his true birthdate and indicated he was not 21 until 2019. The driver license was in the vertical format issued to those under 21. Osborn left the area and returned a few moments later serving decoy Hernandez his beer. She then left the area relinquishing control of the beer to Decoy Hernandez. Osborn later told both the ABC Agents and her employer that she had misread the birthdate on the decoy's identification. To that extent, the evidence established a violation of 25658(a) occurred as alleged in Count 1 in the accusation.

3. Respondent argued there was a violation of the "fairness" provision of rule 141(a) and rule 141(b)(5) because apparently Agent Kurian's report reflecting his observations of the decoy operation did not specifically mention that 19 year old Valerie Aldaco was with Decoy Hernandez when he ordered and was served his beer.⁶ This theory has no merit. Unfairness is not a separate defense under rule 141. As the court of appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS, LLC)*⁷ clearly held:

Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5)) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation.⁸

Elsewhere, the court of appeal makes clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b).⁹ Therefore, even if Agent Kurian's report did not mention Aldaco accompanied Decoy Hernandez that did not establish a defense under rule 141.

4. Additionally, even if Valerie Aldaco was not mentioned in Agent Kurian's report, there was no actual prejudice to Respondent and it was afforded due process of law. After the incident, Osborn told Respondent's management she was the one who took the order for beer from Decoy Hernandez and an order for water from Aldaco. Osborn added she misread Decoy Hernandez's identification and that is what caused her to serve beer to him. Osborn never mentioned Aldaco played any role in or otherwise caused or prompted her to serve beer to Decoy Hernandez. Respondent knew of the presence of Aldaco even if she were not mentioned in Agent Kurian's report. Lastly, as Osborn still works for Respondent, if there was any relevant evidence she needed to testify to in defense to the accusation, it

⁶ Respondent did not seek admission of the actual investigative report so this point was only testified to by Agent Kurian who did not recall Valerie Aldaco being in the company of Decoy Hernandez when Osborn served him his beer.

⁷ 7 Cal. App. 5th 628, 213 Cal. Rptr. 3d 130 (2017).

⁸ *Id.* at 638, 213 Cal. Rptr. 3d at 138.

⁹ *Id.* at 640, 213 Cal. Rptr. 3d at 140.

was up to Respondent to call her as a witness at the hearing. Respondent did not call Osborn as a witness at the hearing.¹⁰

5. Respondent contended the presence of 19 year old Valerie Aldaco with Decoy Hernandez might have made him look older than his actual age. This argument also has no merit. Firstly, Respondent presented no evidence or authority to establish the presence of one 19 year old in the presence of another 19 year old makes the other look older or younger. Secondly, Respondent's server, Ms. Osborn, told both Respondent's management and ABC Agents that the cause of her serving beer to Decoy Hernandez was that she misread his identification. She stated no other reason for her actions. Respondent presented no evidence the presence of Aldaco played any specific role whatsoever in Osborn's decision to serve beer to Decoy Hernandez. Further, as Osborn still works for Respondent, Respondent could have had Osborn testify to describe what effect Aldaco's presence, actions, or appearance had in her decision to sell to Decoy Hernandez. Osborn did not testify at the hearing at all. Evidence Code section 412 states: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust". Respondent's argument that Aldaco's presence had any actual material effect on Osborn's decision to serve beer to Decoy Hernandez is pure conjecture, speculative, and lacks any merit.

6. Respondent also argued that because Aldaco was present with Decoy Hernandez when he ordered and was served his beer, the Department was obligated under section 25666 to produce her for examination at the hearing. Respondent's argument has no merit.

7. Section 25666 (a) states: "In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor..." In this instance, the alleged minor involved and specified in the accusation forming the basis of disciplinary action against Respondent was Decoy Hernandez. He was the minor who was served beer by Respondent's employee. The Department presented Decoy Hernandez for examination at the hearing, and he, in fact, testified regarding his activities at the licensed premises when acting as a decoy. Respondent cross-examined the decoy. No cause for disciplinary action against Respondent was based on the presence or actions of 19 year old Aldaco. She was not mentioned in the accusation as an alleged minor. Although she was present when Osborn served Decoy Hernandez his beer after examining his identification, Aldaco only ordered water from Osborn. Section 25666 did

¹⁰ Osborn did not testify at the hearing at all.

not impose any obligation on the Department to present Aldaco for examination at the hearing.

8. In this instance, the decoy met the appearance standard set forth in rule 141(b)(2). Decoy Hernandez was approximately 5'7" tall and weighed approximately 165 pounds. He wore a black hooded zippered sweater over a black t-shirt. He wore blue jeans and Adidas tennis shoes having a grey and white zebra like pattern. His hair was black/dark brown and no longer than approximately one to two inches on top and cut very short on the sides. He had no beard, moustache, goatee or like facial hair. (Exhibit 2: Photo of decoy) He participated in one prior decoy operation and one prior shoulder-tap operation. He had been a police explorer for approximately two years prior to the instant investigation at Respondent's premises. He testified his explorer experience made him feel more mature or confident. Decoy Hernandez's over all appearance, demeanor, poise, and mannerisms were of a person generally expected to be under 21 years of age under the actual circumstances presented to Osborn in this case.

9. Except as set forth in this decision, any other allegations in the accusation and defenses raised thereto in the pleadings or at the hearing lack merit.

10. As Respondent did not establish non-compliance with Rule 141 or any of its sub-parts, a defense to the accusation under Rule 141(c) was not established. The evidence supported sustaining Count 1 of the accusation.

PENALTY

1. In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, title 4, division 1, article 22, section 144, commonly referred to as "rule 144". Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension.

2. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors. One of the mitigating factors listed is "Length of licensure at subject premises without prior discipline or problems."

3. The Department recommended a mitigated 5 day suspension. It acknowledged Respondent was licensed since 2003 with no disciplinary history. However, it also noted Respondent's server, Osborn, did not notice the decoy's identification clearly indicated he was not yet 21 years old and that his driver license was in the vertical format used for licenses issued to those under 21 years of age.

4. Respondent contended if any penalty was assessed, a five or 10 day suspension, with any days of suspension imposed stayed for an unspecified probationary period. Respondent argued that preceding the violation, it had a standard training plan in place for employees who served alcoholic beverages. After the violation herein occurred, Respondent took several added steps to retrain and remind all employees regarding the proper procedures for responsible alcoholic beverage service.

5. In this instance, Respondent has been licensed for a substantial length of time, 15 years, with no prior violations. While there was employee training regarding proper alcoholic beverages sales practices prior to the incident, after the decoy incident, Respondent took several added robust and thorough measures to retrain its service staff regarding proper and responsible practices for sales and service of alcoholic beverages. The penalty ordered below reflects a weighing of Respondent's past performance and steps taken to avoid future violations against the facts of this particular violation, which did not appear to involve aggravating circumstances but more the result of negligence and a loss of focus by Osborn.

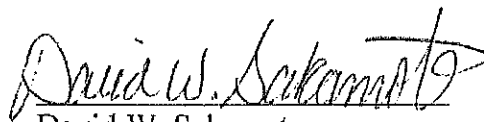
6. Except as set forth herein, all other contentions of the parties in the pleadings or at the hearing with respect to penalty lack merit.

ORDER

Count 1 of the accusation is sustained.

Respondent's license is suspended for 5 days, however, all 5 days of the suspension are stayed for a period of 12 months from the date the decision in this matter becomes final upon condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the term of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and impose any part of or all of the stayed suspension.

Dated: October 2, 2018


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/>	Adopt
<input type="checkbox"/>	Non-Adopt: _____
By:	<u>Jacob A. Applequist</u>
Date:	<u>11/28/18</u>